

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY K. SMITH)	
Claimant)	
VS.)	
)	Docket No. 179,210
CONVOY COMPANY)	
Respondent)	
AND)	
)	
RYDER INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Robert H. Foerschler on July 11, 1996. The Appeals Board heard oral argument on November 19, 1996.

APPEARANCES

Claimant appeared by his attorney, Davy C. Walker of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, David M. Druten of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Charles D. Vincent of Paola, Kansas.

RECORD AND STIPULATIONS

The Appeals Board reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits based upon a 65.5 percent work disability. Respondent argues that the Award should be based upon disability of the left lower extremity only. The nature and extent of claimant's disability is the sole issue to be considered on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board concludes that the Award of the Administrative Law Judge should be affirmed.

Claimant was injured on October 9, 1992, while performing duties as a car hauler for respondent Convoy Company. As claimant unloaded the last car on his trailer, he fell between the rails. There is no dispute that claimant injured his left knee in this fall. Respondent contests, however, claimant's allegation that he also injured his back and shoulder.

The Administrative Law Judge awarded benefits for a work disability and we agree. The Appeals Board first finds that the injury includes the shoulder and back. This finding is based upon the fact that claimant did complain of injury to his back and shoulder, as well as his knee, to the initial group of health care providers at North Kansas City Clinic. Two of the evaluating physicians testified that claimant's injuries included permanent impairment to his back and shoulder. Ronald Zipper, D.O., the physician who evaluated claimant by referral from claimant's counsel, diagnosed post traumatic dorsal and lumbar strain exacerbated by the injury at issue in this case. He also found evidence of right rotator cuff injury. These findings were in addition to the finding of injury in claimant's knee. He rated claimant's permanent partial impairment at 33 percent. He indicated his rating consisted of 2 percent for the dorsal injury, 10 percent for the lumbar strain, 18 percent for the right shoulder and 5 percent to the right knee with 48 percent to the left lower extremity. The right knee disability was attributed to preexisting arthritis.

Ernest H. Neighbor, M.D., the independent medical examiner appointed by the Court, also found claimant's injury resulted in permanent impairment in the shoulder and back. He diagnosed the shoulder injury as tendinitis which he rated as a 5 percent impairment to the body as a whole. The low back injury he rated at 0-5 percent for subjective complaints. These were in addition to the 39 percent to the left lower extremity which he converted to 16 percent to the body as a whole.

On the basis of the testimony of the claimant, Dr. Zipper, and Dr. Neighbor, the Appeals Board agrees with the conclusion that claimant's injury included the injury to unscheduled portions of the body and that he is entitled to disability based upon an injury to the body as a whole.

The nature and extent of claimant's disability is governed by provisions of the Workers Compensation Act in effect prior to July 1, 1993. At the time of claimant's injury, permanent partial disability was defined in K.S.A. 1992 Supp. 44-510e as follows:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

Except for a two- to three-week period when claimant returned to work for respondent, claimant has not, since the injury, been able to work at a wage comparable to his preinjury wage. The Appeals Board, therefore, concludes that he is entitled to work disability. Claimant presented testimony of Donald E. Vander Vegt, an expert in vocational counseling rehabilitation. Using Dr. Neighbor's restrictions, he concluded claimant had lost 70 percent of his ability to perform work in the open labor market. He testified that using Dr. Zipper's restrictions, claimant lost 96% of his ability to perform work in the open labor market. He also opined that claimant had lost 70 percent of his ability to earn wages comparable to his preinjury wage. The Administrative Law Judge discounted these percentages based upon several factors identified in the Award and arrived at a work disability of 65.5 percent. This Administrative Law Judge's opinion took into consideration both claimant's loss of ability to earn a comparable wage and his loss of ability to perform work in the open labor market. The parties stipulated that claimant's average weekly wage at the time of his injury was \$1,526.68. With this wage, the work disability results in an award of the maximum amount of \$100,000. The Appeals Board concludes that the 65.5 percent work disability awarded by the Administrative Law Judge represents a reasonable evaluation of claimant's work disability and affirms that finding.

The Administrative Law Judge deducted from the Award certain amounts awarded on a prior claim for injuries to claimant's left knee. That finding is not disputed on appeal. The Appeals Board, therefore, affirms that portion of the Award that deducts 100 percent of the amounts awarded for an injury on August 1, 1989.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated July 11, 1996, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gary K. Smith, and against the respondent, Convoy Company, and its insurance carrier, Ryder Insurance Company, and against the Kansas Workers Compensation Fund, for an accidental injury which occurred October 9, 1992, and based upon an average weekly wage of \$1,526.68 for 38 weeks of temporary total disability compensation at the rate of \$299 per week or \$11,362.00, followed by 210.57 weeks of permanent partial disability compensation at the reduced rate of \$215 per week or \$45,272.55 and thereafter permanent partial disability compensation at \$299 per week for 145.03 weeks or \$43,365.45 for a 65.5% permanent partial general body disability making a total award not to exceed \$100,000.00 and with a contribution factor of 100% for a prior injury on August 1, 1989.

As of December 31, 1996, there is due and owing claimant 38 weeks of temporary total disability compensation at the rate of \$299 per week or \$11,362.00, followed by 182.57 weeks of permanent partial disability compensation at the reduced rate of \$215 per week or \$39,252.55, for a total of \$50,614.55 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$49,385.45 is to be paid for 28 weeks at the reduced rate of \$215 per week or \$6,020.00, to be followed by 145.03 weeks at the rate of \$299 per week or \$43,365.45, until fully paid or further order of the Director.

The claimant is also awarded \$540.40 in mileage and expenses of prescriptions of \$56.57.

The Kansas Workers Compensation Fund is ordered to pay 80 percent of the benefits paid to date and 50 percent of the additional amount awarded above as stipulated and agreed.

Future medical treatment for the claimant for injuries compensated in this proceeding may be awarded upon a proper application and a hearing upon notice to all parties.

Unauthorized medical expense of \$350.00 is allowed for Dr. Zipper's services.

Costs of transcripts in the record are taxed against the respondent as follows:

Metropolitan Court Reporters, Inc.	\$1,022.40
Hostetler & Associates, Inc.	459.50
Gene Dolginoff Associates, Ltd.	502.45

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Davy C. Walker, Kansas City, KS
David M. Druten, Kansas City, KS
Charles D. Vincent, Paola, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director